No. 14-857

In the Supreme Court of the United States

CAMPBELL-EWALD COMPANY, PETITIONER

v.

JOSE GOMEZ, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTIONS PRESENTED

1. Does an offer of "complete relief" eliminate an Article III case or controversy and render the case moot?

2. If the answer to the first question is "yes," can a class-action defendant moot the entire case by offering "complete relief" only to the representative plaintiff and only on the representative plaintiff's individual claims?

3. Jose Gomez alleges that Campbell-Ewald violated the Telephone Consumer Protection Act (TCPA) by sending him a text message that he had not consented to receive. Campbell-Ewald claims that the text message was sent on behalf of the Navy, and that because the Navy is immune from suit Campbell-Ewald should enjoy that same immunity for acts performed on the Navy's behalf. The question presented is:

Can Campbell-Ewald assert "derivative sovereign immunity" for its alleged violations of the TCPA when its contract with the Navy required it to "comply with all applicable Federal . . . laws," and when the Navy had expressly directed Campbell-Ewald to send text messages *only* to those who had "opted in" to receive them?

TABLE OF CONTENTS

Questions presented i
Table of contents ii
Table of authorities iv
Statutory provisions involved 3
Statement 4
A. Facts 5
B. Proceedings below 7
Summary of argument 10
Argument 14
I. An offer of "complete relief" does not moot a case 14
A. Campbell-Ewald's concession that a district court may enter judgment after an offer of "complete relief" destroys any claim that the offer moots the case 14
B. A case does not become moot simply because the parties no longer dispute the relief that should be awarded 18
C. There is no authority from this Court that supports Campbell-Ewald's mootness-by-offer-of-complete-relief theory 23
D. An unaccepted offer cannot moot a case because it is not legally binding on the parties or the courts 27
E. The courts have no authority to impose a forced entry of judgment in response to Campbell-Ewald's offers 31
II. Campbell-Ewald's offers do not moot the class claims 36

III. Campbell-Ewald is not entitled to "derivative sovereign immunity" 43
A. Campbell-Ewald cannot claim "derivative sovereign immunity" for acts that violate a federal statute 44
B. Campbell-Ewald cannot claim "derivative sovereign immunity" for acts that violate the Navy's specific instructions 54
C. Campbell-Ewald's policy arguments are without merit 58
IV. Campbell-Ewald's attacks on class-action lawyers and the TCPA have no bearing on the issues before this court 59
Conclusion 61

TABLE OF AUTHORITIES

Cases:

Arizona v. Rumsey,
467 U.S. 203 (1984) 40

Ass'n of Data Processing Serv. Orgs., Inc. v. Camp,
397 U.S. 150 (1970) 24

Bank of America, N.A. v. Caulkett,
135 S. Ct. 1995 (2015) 40

Bell v. Hood, 327 U.S. 678 (1946) 24–25

Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388 (1971) ..... passim

Blair v. United States, 250 U.S. 273 (1919) 26

Boyle v. United Techs. Corp.,
487 U.S. 500 (1988) 13, 51, 55

California v. San Pablo & Tulare R.R. Co.,
149 U.S. 308 (1893) ..... passim

Chafin v. Chafin, 133 S. Ct. 1017 (2013) 25

Chapman v. First Index, Inc.,
Nos. 14-2773, 14-2775, 2015 WL 4652878
(7th Cir. Aug. 6, 2015) 10, 15, 31

Charvat v. Nat'l Holdings Corp., No. 2:14-cv-2205,
2015 WL 3407657 (S.D. Ohio May 26, 2015) 34

Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) 45, 46

Cnty. of L.A. v. Davis, 440 U.S. 625 (1979) 37

Day v. McDonough, 547 U.S. 198 (2006) 49

Deposit Guar. Nat'l Bank v. Roper,
445 U.S. 326 (1980) ..... passim

Dewsnup v. Timm, 502 U.S. 410 (1992) 40

E. Enters. v. Apfel, 524 U.S. 498 (1998) 53

EEOC v. AutoZone, Inc.,
707 F.3d 824 (7th Cir. 2013) 33
Espenscheid v. DirectSat USA, LLC,
688 F.3d 872 (7th Cir. 2012) 12, 35, 37
Ex parte Young, 209 U.S. 123 (1908) 2, 13, 47
FDIC v. Meyer, 510 U.S. 471 (1994) 45
Filarsky v. Delia, 132 S. Ct. 1657 (2012) 13, 51
Frederiksen v. City of Lockport,
384 F.3d 437 (7th Cir. 2004) 20
Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167 (2000) 38
Gasperini v. Ctr. for Humanities Inc.,
518 U.S. 415 (1996) 17
Gen. Inv. Co. v. N.Y. Cent. R.R. Co.,
271 U.S. 228 (1926) 25
Genesis Healthcare Corp. v. Symczyk,
133 S. Ct. 1523 (2013) ..... passim
Ill. Cent. R.R. Co. v. Adams, 180 U.S. 28 (1901) 36
Iron Arrow Honor Soc'y v. Heckler,
464 U.S. 67 (1983) 14
KBR, Inc., v. Metzgar, 135 S. Ct. 1153 (2015) 58
Knox v. Serv. Emps. Int'l Union, Local 1000,
132 S. Ct. 2277 (2012) 12, 28, 29
Kokkonen v. Guardian Life Ins. Co. of Am.,
511 U.S. 375 (1994) 20–21, 28
Larson v. Domestic & Foreign Commerce Corp.,
337 U.S. 682, 687 (1949) 44
Lexmark Int'l, Inc. v. Static Control Components, Inc., 134 S. Ct. 1377 (2014) 22
Little v. Bowers, 134 U.S. 547 (1890) 23, 24, 26

Logue v. United States, 412 U.S. 521 (1973) 46
Lujan v. Defs. of Wildlife, 504 U.S. 555 (1992) 19
Massachusetts v. EPA, 549 U.S. 497 (2007) 26
Mims v. Arrow Fin. Servs., LLC,
132 S. Ct. 740 (2012) 42
Minneapolis & St. Louis Ry. Co. v. Columbus Rolling Mill Co., 119 U.S. 149 (1886) 27
Morse v. Frederick, 551 U.S. 393 (2007) 49
O'Brien v. Ed Donnelly Enters., Inc.,
575 F.3d 567 (6th Cir. 2009) 18
Plumhoff v. Rickard, 134 S. Ct. 2012 (2014) 5, 6
POM Wonderful LLC v. Coca-Cola Co.,
134 S. Ct. 2228 (2014) 52
Richardson v. McKnight, 521 U.S. 399 (1997) 51
Rufo v. Inmates of Suffolk Cnty. Jail,
502 U.S. 367 (1992) 20
San Mateo Cnty. v. Southern-Pacific R.R. Co.,
116 U.S. 138 (1885) 23, 24, 26
Satterfield v. Simon & Schuster, Inc.,
569 F.3d 946 (9th Cir. 2009) 3
Sherman v. Yahoo! Inc.,
997 F. Supp. 2d 1129 (S.D. Cal. 2014) 42
Smith v. Greystone Alliance, LLC,
772 F.3d 448 (7th Cir. 2014) 32
Steel Co. v. Citizens for a Better Env't,
523 U.S. 83 (1998) 15, 18, 20, 24
Tanasi v. New All. Bank,
786 F.3d 195 (2d Cir. 2015) 33
Tutun v. United States, 270 U.S. 568 (1926) 21, 22
United States v. Lee, 106 U.S. 196 (1882) 45

United States v. Munsingwear, Inc.,
340 U.S. 36 (1950) 15, 16, 17
United States v. Providence Journal Co.,
485 U.S. 693 (1988) 21
United States v. Windsor,
133 S. Ct. 2675 (2013) 11, 21, 22
U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship,
513 U.S. 18 (1994) 16, 17, 31
Wolff v. McDonnell, 418 U.S. 539 (1974) 17
Wood v. Moss, 134 S. Ct. 2056 (2014) 46
Yearsley v. W.A. Ross Constr. Co.,
309 U.S. 18 (1940) ..... passim
Zinni v. ER Solutions, Inc.,
692 F.3d 1162 (11th Cir. 2012) 28

Constitution, Statutes, and Rules:

U.S. Const. art. I, § 9, cl. 7 49
U.S. Const. art. II, § 3 ..... 2, 49, 50, 52
U.S. Const. art. VI, cl. 2 ..... 2, 49, 50, 52
15 U.S.C. § 1116(d)(1)(A) 22
18 U.S.C. § 2340A 49
28 U.S.C. § 2671 46
28 U.S.C. § 2679(b)(2) 2, 13, 47, 50
28 U.S.C. § 2679(b)(2)(B) 2, 47
28 U.S.C. § 2680(j) 58
28 U.S.C. § 2680(k) 49
29 U.S.C. § 216(b) 39
42 U.S.C. § 1983 8
47 U.S.C. § 227(b)(1) 3
47 U.S.C. § 227(b)(3) 41

50 U.S.C. § 1803 22
50 U.S.C. § 1803(b) 22
Act of April 14, 1792, 1 Stat. 254 22
Act of January 29, 1795, 1 Stat. 414 22
Fed. R. Civ. P. 12(h)(3) 14, 16, 17, 18
Fed. R. Civ. P. 23(a)(4) 34
Fed. R. Civ. P. 23(c)(3)(B) 42
Fed. R. Civ. P. 41(a)(2) 20
Fed. R. Civ. P. 68(a) 20, 31
Fed. R. Civ. P. 68(b) 27
Fed. R. Crim. P. 11(a)(1) 19
Fed. R. Crim. P. 11(c) 19
Fed. R. Crim. P. 32(k) 19
Sup. Ct. R. 14.1(a) 49

Administrative Regulations:

Federal Acquisition Regulation § 52.212-4(q) 4
In re DISH Network, LLC,
28 FCC Rcd. 6574, 6574 (2013) 3
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Brief of Amicus Legal Aid Soc'y of the District of Columbia et al., *Campbell-Ewald v. Gomez*, (No. 14-857) 33
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Oral Argument, *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878 25
Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1 (1963) 44
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BRIEF FOR THE RESPONDENT

A civil defendant does not "moot" an Article III case or controversy by offering to settle on the plaintiff's terms. This is no different from a criminal defendant's offer to plead guilty and accept the maximum sentence. In each situation, the defendant's capitulation might justify entry of judgment for the plaintiff or prosecutor. But it does not eliminate an Article III case or controversy or deprive the court of subject-matter jurisdiction. A mere *offer* of complete relief—which is not legally binding on anyone—does not disable the courts from redressing the plaintiff's injuries. And if a mere offer of complete relief could render a case moot, then district courts would be powerless to enter judgment in response to a defendant's unilateral surrender. Not even Campbell-Ewald is will-

ing to accept that unavoidable implication of its mootness argument. Pet. Br. 10, 21.

Campbell-Ewald's argument for "derivative sovereign immunity" is equally groundless. The government's sovereign immunity does not carry over to employees, agents, or contractors who violate federal law. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Ex parte Young*, 209 U.S. 123, 159–60 (1908); 28 U.S.C. § 2679(b)(2)(B) (no Westfall Act immunity for government employees who violate federal statutes). And the idea that the executive can "authorize" its contractors to violate federal statutes is untenable and unconstitutional. *See* U.S. Const. art. II, § 3 (President "shall take Care that the Laws be faithfully executed"); *id.* art. VI, cl. 2 (federal statutes enacted "in Pursuance" of the Constitution "shall be the supreme Law of the Land"). Government contractors cannot assert a Nuremberg defense if their contract instructed them to violate an act of Congress.

Even if this Court wanted to create a new immunity for government contractors, that would not help Campbell-Ewald because the Navy never authorized it to violate the TCPA. Campbell-Ewald's contract with the Navy required compliance "with all applicable Federal ... laws." J.A. 220. And the Navy specifically directed Campbell-Ewald to send text messages only to those who had "opted in" to receive them. J.A. 42–45. No contractor can plausibly claim "derivative" sovereign immunity for acts that violate not only the sovereign's laws but also the sovereign's explicit instructions. *See Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940)

("[T]here is no liability on the part of the contractor for executing [Congress's] will.").

STATUTORY PROVISIONS INVOLVED

The Telephone Consumer Protection Act (TCPA) provides, in relevant part:

> It shall be unlawful for any person within the United States . .—
>
> (A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice—
>
> . . .
>
> (iii) to any telephone number assigned to a . . . cellular telephone service . . .

47 U.S.C. § 227(b)(1).

The FCC interprets "call" to include text messaging. *See In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 18 FCC Rcd. 14014, 14115 (2003); *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 952 (9th Cir. 2009). The FCC also interprets the TCPA to incorporate vicarious liability. *See In re DISH Network, LLC*, 28 FCC Rcd. 6574, 6574 (2013); Pet. App. 10a–13a.

Other relevant statutes and constitutional provisions are at Pet. App. 64a–68a.

STATEMENT

Before summarizing the undisputed facts, we must note that Campbell-Ewald's rendition of the facts is incomplete in several respects.

First, Campbell-Ewald's contract with the Navy required compliance "with all applicable Federal, State and local laws." J.A. 220; *see also id.* at 81 (incorporating this requirement from Federal Acquisition Regulation (FAR) § 52.212-4(q)). This contractual provision is unmentioned in Campbell-Ewald's brief. But it refutes any suggestion that the Navy "approved" or "authorized" anyone to send text messages in violation of the TCPA.

Second, Campbell-Ewald incorrectly states that "the Navy sent" the text messages. Pet. Br. 2. The text messages were sent by MindMatics, not the Navy. J.A. 41–42, 73–77, 183–89; Pet. Br. 46 ("MindMatics sent the text message."). If Campbell-Ewald thinks that MindMatics's actions should be attributed to the Navy under principles of agency, then it should make that clear before telling this Court that "the Navy sent" the text messages.

Third, Campbell-Ewald insists that it offered Mr. Gomez "complete relief on his TCPA claim." Pet. Br. 2. But it neglects to mention that Mr. Gomez had demanded "reasonable attorneys' fees," which neither of Campbell-Ewald's offers provided. *Compare* J.A. 23 *with* Pet. App. 52a–61a. Calling this "an offer of complete relief" begs an important question by assuming that an offer without attorneys' fees qualifies as "complete relief"—even when the plaintiff has demanded them, and even when class certification would allow the representative plaintiff to share the lawyer's bill that otherwise would be borne

entirely by him. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980).

A. Facts

The following facts are undisputed. Because Campbell-Ewald is seeking summary judgment on its "derivative sovereign immunity" claim, any facts relevant to immunity must be viewed in the light most favorable to Mr. Gomez. *See Plumhoff v. Rickard*, 134 S. Ct. 2012, 2017 (2014).

In 2005, the Navy entered into a contract with Campbell-Ewald. J.A. 78–175. The contract required Campbell-Ewald to provide advertising services in exchange for a fixed monthly payment. J.A. 82. This fixed-price arrangement established annual recruiting goals but gave Campbell-Ewald substantial discretion in proposing media strategies and advertisements for the Navy's approval. J.A. 29, 30–31, 91. The contract did not require Campbell-Ewald or anyone else to send text messages. And it required Campbell-Ewald to comply with all federal laws, including the TCPA. J.A. 81, 220.

Under the contract, Campbell-Ewald would develop an annual "Advertising and Marketing Plan" for the Navy's review and approval. J.A. 87. In December 2005, Campbell-Ewald submitted its plan for fiscal year 2006, which briefly mentioned the possibility of using text messaging. C.A.E.R. 378–79 ("Look for emerging tools that prove the high-tech claims and make Navy seem contemporary. Potential media to test include: – Podcasting – Gaming – Mobile, SMS, etc. – Blogs – RSS feeds"). In January 2006, the Navy approved the annual plan but did not provide further instruction to Campbell-Ewald.

J.A. 34.[1] Campbell-Ewald then chose MindMatics, LLC, as the subcontractor that would implement the proposed text-messaging campaign. C.A.E.R. 159–66.

Campbell-Ewald submitted a more detailed proposal to the Navy on March 17, 2006. J.A. 176–82 ("Navy 2006 Wireless/Mobile Tactical Media Recommendations"). This document provided that "MindMatics will deliver a Navy branded SMS (text) direct mobile marketing 'push' program to the cell phones of 150,000 Adults 18–24 from an opt-in list of over 3 million." J.A. 182. The Navy approved this plan based on Campbell-Ewald's representation that the text messages would be sent only to 18-to-24 year olds—and only to those who had "opted in" to receive them, as required by the TCPA. J.A. 41–44.

In April 2006, Campbell-Ewald and MindMatics signed a contract. J.A. 183–89. The contract required MindMatics to assemble an opt-in list of 150,000 adults ages 18–24 and send them the Navy-approved text message. J.A. 185–87. On April 28, 2006, the Navy approved the text message that Campbell-Ewald had drafted, after changing one word. J.A. 41, 72. Then, at Campbell-

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[1] Campbell-Ewald's brief implies that it was the Navy and not Campbell-Ewald that initiated the idea of a mobile-marketing campaign. Pet. Br. 5 ("In 2006, as part of an ongoing contract with the Navy, the Navy directed Campbell-Ewald to develop a mobile marketing campaign using emerging forms of technology"). Omitting that Campbell-Ewald proposed the mobile-marketing campaign may improve the appearance of Campbell-Ewald's "derivative sovereign immunity" argument. But it does not assist the Court in its duty to construe the facts in the manner most favorable to Mr. Gomez. *See Plumhoff*, 134 S. Ct. at 2017.

Ewald's direction, MindMatics sent the following text message to approximately 100,000 individuals:

> Destined for something big? Do it in the Navy. Get a career. An education. And a chance to serve a greater cause. For a FREE Navy video call [phone number]

J.A. 20.

The text-messaging campaign was bungled in numerous ways. First, only 102,513 messages were sent, even though the Navy-approved plan called for 150,000 recipients. *See* Decl. of William M. Kushner, ECF No. 59-6. Second, respondent Jose Gomez received the message even though he had never consented to receive it and was nearly 40 years old at the time—far above the Navy-approved age range of 18–24. J.A. 20, 42. Third, the Navy received complaints from other recipients who, like Mr. Gomez, had never consented to receive the message. C.A.E.R. 175–76. Finally, Campbell-Ewald did nothing to verify that the "opt in" list was limited to the required age range and to those who had consented to receive text messages of this sort. J.A. 59–61, 64–68.

B. Proceedings Below

Mr. Gomez filed a class-action complaint against Campbell-Ewald, alleging that it violated the TCPA by sending text messages to nonconsenting recipients. J.A. 16–24. Mr. Gomez sued on behalf of himself and others who had been spammed by Campbell-Ewald. J.A. 20. His demand for relief sought an order certifying the class; actual and statutory damages for himself and the class; an injunction requiring Campbell-Ewald to "cease all

wireless spam activities"; reasonable attorneys' fees and costs; and "further and other relief the Court deems reasonable and just." J.A. 23.[2]

Campbell-Ewald moved to dismiss under Rule 12(b)(6). Its motion did not invoke "derivative sovereign immunity" and did not cite *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940). Instead, it argued that the Navy is not a "person" under the TCPA—and that because the TCPA does not create a cause of action against the Navy, it cannot supply a cause of action against anyone acting on the Navy's behalf. *See* Mem. Supp. Def.'s Mot. Dismiss at 7, ECF No. 6-1. The district court rejected this argument because there is no language in the TCPA exempting "persons" acting on behalf of non-"persons" from liability. *See* Order Re Def.'s Mot. Dismiss at 6–9, ECF No. 21. The Navy may not be a "person" under the TCPA, but Campbell-Ewald surely is. *Cf.* 42 U.S.C. § 1983 (authorizing lawsuits against state officers and agents, even though the State is not a "person" subject to liability under the statute).

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[2] After Mr. Gomez filed his complaint, Campbell-Ewald agreed to extend the deadline for filing the motion for class certification, and filed a joint stipulation declaring that:

> Campbell-Ewald agrees that it would be inefficient for the Court and the parties to expend resources on class certification-related activities before Defendant has responded to the Complaint and before any threshold motions are resolved and the pleadings are more settled.

See Stipulation To Move Date For Filing Motion For Class Certification at 2, ECF No. 9.

Then Campbell-Ewald filed its answer, asserting "derivative sovereign immunity" as an affirmative defense. *See* Def.'s Answer ¶ 38, ECF No. 23 ("Plaintiff's Complaint against C-E as an agent of the United States is barred by the doctrine of derivative sovereign immunity."). Campbell-Ewald did not assert qualified immunity (or any immunity other than "derivative sovereign immunity") in its answer, Rule 12(b)(6) motion, or motion for summary judgment.

After filing its answer, Campbell-Ewald made an offer of judgment under Rule 68, and tendered a separate settlement offer to Mr. Gomez. Each offered Mr. Gomez $1,503 for every unlawful text message he had received from Campbell-Ewald or its agents; payment of costs; and a stipulated injunction prohibiting Campbell-Ewald from violating the TCPA. Pet. App. 52a–61a. Neither offer included attorneys' fees, class certification, or class-wide relief. Mr. Gomez rejected these offers and moved to certify the class. Campbell-Ewald responded by moving to dismiss the case as moot under Rule 12(b)(1). The district court denied Campbell-Ewald's motion and deferred ruling on the motion for class certification. Pet. App. 35a–51a.

After discovery, Campbell-Ewald moved for summary judgment on the ground of "derivative sovereign immunity." Mem. Supp. Def.'s Mot. Summ. J. at 8–10, ECF No. 116. The district court granted the motion, holding that "[i]nasmuch as C–E acted on behalf of the Navy, it is . . . immune under the doctrine of derivative sovereign immunity." Pet. App. 30a. Mr. Gomez appealed, and the court of appeals reversed. Like the district court,

the court of appeals rejected Campbell-Ewald's mootness argument. Pet. App. 4a–7a. But it also rejected Campbell-Ewald's derivative-sovereign-immunity defense and remanded for further proceedings. Pet. App. 14a–20a. This Court granted certiorari.

SUMMARY OF ARGUMENT

1. The problems with Campbell-Ewald's mootness-by-offer-of-complete-relief theory have been well rehearsed. *See Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532–37 (2013) (Kagan, J., dissenting); *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878 (7th Cir. Aug. 6, 2015) (Easterbrook, J.); Brief for the United States as Amicus Curiae at 10–15, *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013) (No. 11-1059). Yet the shortcomings of Campbell-Ewald's mootness argument extend beyond the defects that Justice Kagan, Judge Easterbrook, and the Solicitor General have already identified.

The first problem is Campbell-Ewald's concession that a district court may enter judgment for the plaintiff *after* the defendant has supposedly "mooted" the case by offering "complete relief." Pet. Br. 10, 21. That concession alone sinks Campbell-Ewald's mootness argument. If the district court retains the prerogative to enter a judgment, then by definition an Article III case or controversy continues to exist after the defendant offers "complete relief."

Perhaps Campbell-Ewald wants to leave open the possibility of judgment because it is absurd to think that a mere offer of complete relief requires a jurisdictional dismissal that sends the plaintiff home empty-handed.

But it is equally absurd to claim that a district court may enter judgment *after* a case has become moot. The mootness-by-offer-of-complete-relief theory is pinioned on the horns of this dilemma.

The second problem is that Campbell-Ewald's mootness argument rests entirely on its claim that Article III "demands adversity between the parties . . at all times." Pet. Br. 10. That premise is demonstrably untrue. Guilty pleas, consent decrees, confessions of error by the solicitor general, and ex parte litigation in which there is no adverse party at all—these are just a sampling of the many situations in which Article III jurisdiction co-exists with an absence of "adversity between the parties." And Campbell-Ewald says nary a word about *United States v. Windsor*, 133 S. Ct. 2675 (2013), which specifically holds that adverse parties are *not* required by Article III.

The third problem is that there is no authority from this Court that supports Campbell-Ewald's mootness-by-offer-of-complete-relief theory. The nineteenth-century cases on which Campbell-Ewald relies have nothing to do with Article III's case-or-controversy requirement; they establish only that a plaintiff who sues to collect a debt no longer has a viable claim after the defendant pays.

The fourth problem is that rejected or unaccepted settlement offers are not legally binding on the parties or the courts. *See Genesis Healthcare*, 133 S. Ct. at 1533–34 (Kagan, J., dissenting). Campbell-Ewald never denies this, but it also never explains how a rejected offer that has no legal effect can render a case moot. A

case becomes moot "only when it is *impossible* for a court to grant *any* effectual relief." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (emphasis added) (citation and internal quotation marks omitted). It remains possible for courts to grant relief after a defendant tenders an offer of settlement or judgment.

Finally, Campbell-Ewald is wrong to suggest that the district court could have forced Mr. Gomez to accept its offers by entering a judgment. A court may not compel a plaintiff to accept a settlement offer for anything less than his entire demand for relief—and Campbell-Ewald failed to offer the attorneys' fees or class-wide relief that Mr. Gomez had demanded. The only circumstance in which a district court may impose a forced entry of judgment is when the defendant "unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory." *Genesis Healthcare*, 133 S. Ct. at 1535–36 (Kagan, J., dissenting). Campbell-Ewald's offers do not meet that standard.

2. Even if Campbell-Ewald could somehow show that Mr. Gomez's individual claims have become moot, the class claims would remain live because Mr. Gomez retains an indisputable financial interest in the class-certification decision. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333–34 & n.6, 336 (1980); *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 874–75 (7th Cir. 2012). *Roper* also specifically disapproved the "pick-off" maneuver that Campbell-Ewald is attempting to deploy—a tactic that would allow defendants to perpetually evade class certification by tendering "complete

relief" to successive representative plaintiffs. 445 U.S. at 339. Campbell-Ewald has not asked this Court to repudiate any part of *Roper*, so *Roper*'s analysis should control here.

3. Campbell-Ewald's argument for "derivative sovereign immunity" fares no better. Sovereign immunity extends only to lawsuits brought against the sovereign; it does not protect employees or contractors who violate federal law while acting on the government's behalf. *See Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971); *Ex parte Young*, 209 U.S. 123, 159–60 (1908). Government agents might be able to assert *qualified* immunity for reasonable mistakes of law. *See Filarsky v. Delia*, 132 S. Ct. 1657 (2012). And contractors may have a preemption defense against *state*-law claims if their federal obligations require them to do something that state law proscribes. *See Boyle v. United Techs. Corp.*, 487 U.S. 500 (1988); *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18 (1940). But none of that supports an absolute immunity for government employees or contractors who violate federal statutes in the scope of their employment or contractual duties. Indeed, the Westfall Act specifically withholds its immunity from federal employees who violate congressional enactments or the Constitution. *See* 28 U.S.C. § 2679(b)(2).

Even if Campbell-Ewald could convince this Court to invent a new "immunity" for federal contractors who violate federal statutes, Campbell-Ewald would *still* lose because the Navy never authorized anyone to send text messages in violation of the TCPA. Campbell-Ewald's contract with the Navy required compliance "with all

applicable Federal . . . laws." J.A. 220. And the Navy specifically instructed Campbell-Ewald to send text messages *only* to those who had "opted in" to receive them. J.A. 42–45. Even if "derivative sovereign immunity" exists, it cannot possibly extend to acts that violate both federal law *and* the Navy's explicit instructions.

ARGUMENT

I. AN OFFER OF "COMPLETE RELIEF" DOES NOT MOOT A CASE

A. Campbell-Ewald's Concession That A District Court May Enter Judgment After An Offer Of "Complete Relief" Destroys Any Claim That The Offer Moots The Case

Campbell-Ewald admits that a district court may "enter[] judgment" after the defendant offers "complete relief." Pet. Br. 10, 21. That concession is incompatible with its claim that an offer of complete relief "eliminates an Article III case and controversy" and renders the case moot. Pet. Br. 10. Mootness deprives a district court of subject-matter jurisdiction,[3] and a district court that lacks subject-matter jurisdiction may not, under any circumstance, enter a judgment. *See* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court *must* dismiss the ac-

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[3] *See Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983) ("Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies.").

tion." (emphasis added)); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." (citation and internal quotation mark omitted)); *Chapman v. First Index, Inc.*, Nos. 14-2773, 14-2775, 2015 WL 4652878, *3 (7th Cir. Aug. 6, 2015) ("[A] district court cannot enter judgment in a moot case."). By admitting that the district court retains the authority to enter judgment after the defendant offers "complete relief," Campbell-Ewald has conceded defeat on the first question presented.

Campbell-Ewald tries to salvage its case by denying that a district court must enter a jurisdictional dismissal when a case becomes moot. Pet. Br. 21. Instead, Campbell-Ewald suggests that jurisdictional dismissal is only "the typical course" (rather than the mandatory course) when a case becomes moot before entry of judgment:

> When a court determines that a case is moot, the typical course is to order dismissal of the case. *See, e.g., United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); Pet. 14 (citing cases).

Pet. Br. 21. That statement is imprecise and misleading. *Munsingwear*'s non-absolute preference for vacatur and dismissal governs only how an *appellate* court should respond when a case becomes moot *while on appeal*:

> The established practice of the Court in dealing with a civil case from a court in the federal system *which has become moot while on its*

> *way here or pending our decision on the merits* is to reverse or vacate the judgment below and remand with a direction to dismiss.

340 U.S. at 39 (emphasis added). *Munsingwear* has nothing to say about a district court's unflagging duty to dismiss cases that become moot *before* entry of judgment.

Campbell-Ewald is equally off base when it suggests that *United States Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), permits district courts to "dispose[] of moot cases in the manner most consonant to justice." Pet. Br. 21 (quoting *Bancorp*, 513 U.S. at 24 (internal quotation marks omitted)). Campbell-Ewald is quoting this Court out of context. *Bancorp* (like *Munsingwear*) involved a case that became moot while on appeal. *See* 513 U.S. at 21. And *Bancorp* (like *Munsingwear*) addressed only whether an *appellate* court should vacate lower-court rulings that had been entered before the case became moot. *See id.* at 21–29. Whatever latitude an appellate court may enjoy when a case becomes moot *after* the entry of judgment, there remains only one possible disposition when a case becomes moot *before* entry of judgment—and that is to dismiss for lack of subject-matter jurisdiction. *See* Fed. R. Civ. P. 12(h)(3). Nothing in *Bancorp* or *Munsingwear* changes or undermines that ironclad rule of federal-court practice.

Even if it were possible to construe *Bancorp* or *Munsingwear* as permitting district courts to enter judgment in moot cases, this Court should avoid interpreting its opinions in a manner that contradicts the federal rules of civil procedure. Rule 12(h)(3) is unequivocal:

A federal district court "*must dismiss* the action" if it "determines at any time that it lacks subject-matter jurisdiction." Fed. R. Civ. P. 12(h)(3) (emphasis added). Permitting district courts to enter judgments after a case becomes moot would place this Court's case law at odds with the rules of civil procedure that this Court prescribes. The Court makes every effort to avoid these types of conflicts. *See Gasperini v. Ctr. for Humanities Inc.*, 518 U.S. 415 (1996). Yet Campbell-Ewald does not even acknowledge Rule 12(h)(3), let alone explain how Rule 12(h)(3) could survive its revisionist interpretations of *Bancorp* and *Munsingwear*.

Finally, Campbell-Ewald never offers any rule, standard, or criteria for determining when a district court should enter judgment for the plaintiff, rather than a jurisdictional dismissal that sends the plaintiff home empty-handed. All that Campbell-Ewald says is that dismissal is the "typical course," but that district courts "may also dispose of the case by entering judgment according to the terms of the offer of complete relief." Pet. Br. 21. That appears to leave the district court with unfettered discretion to choose between these two dispositions. *Bancorp* and *Munsingwear* won't provide any guidance; those rulings govern only how an appellate court resolves cases that become moot while on appeal. And Campbell-Ewald will not even say whether the district court in *this* case should have entered judgment for Mr. Gomez or dismissed for lack of jurisdiction. It is not clear that Campbell-Ewald's proposed regime would even comply with constitutional due-process requirements. *See Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)

("The touchstone of due process is protection of the individual against arbitrary action of government." (citation omitted)). And even if it did, this Court should be loath to confer such arbitrary powers on the federal courts.

Campbell-Ewald correctly observes that some *lower* courts have held that an offer of "complete relief" both moots a case and permits the district court to enter judgment. Pet. Br. 21 (citing *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 574–75 (6th Cir. 2009)). Those decisions are wrong; they violate Rule 12(h)(3) and the rulings from this Court that require district courts to dismiss cases immediately when they lack subject-matter jurisdiction. *See Steel Co.*, 523 U.S. at 94. Campbell-Ewald makes no effort to defend the reasoning of these lower-court decisions—nor does it defend the notion that a district court may enter judgment after a case has become moot. Instead, it acts as though the brute fact that some lower courts have endorsed this self-refuting idea should lead this Court to do the same. That is a wish, not an argument. The mere observation that courts have permitted entry of judgment after concluding that a case has become moot does not supply a *reason* for this Court to follow their example.

B. A Case Does Not Become Moot Simply Because The Parties No Longer Dispute The Relief That Should Be Awarded

Even if Campbell-Ewald could escape or retract its fatal concession that a district court retains authority to enter judgment after an offer of "complete relief," the Court should reject Campbell-Ewald's mootness argument for another reason: Campbell-Ewald is wrong to

assert that an Article III case or controversy vanishes when the defendant capitulates and offers the plaintiff everything he demands. Such unilateral surrender might justify the entry of *judgment*, but it does not remove jurisdiction or eliminate an Article III case or controversy.

Consider the criminal-law equivalent of an "offer of complete relief": a defendant who pleads guilty and agrees to the maximum allowable sentence. *See* Fed. R. Crim. P. 11(a)(1), (c). In that situation, there is no longer "adversity" between the parties, and the defendant has "thrown in the towel" by offering the government everything it could obtain after a trial. Pet. Br. 16 (citations and internal quotation marks omitted). But that does not eliminate an Article III case or controversy, and it does not allow the district court to dismiss the prosecution as moot and allow the defendant to walk free. Instead, the district court retains jurisdiction and proceeds to enter a judgment of conviction. *See* Fed. R. Crim. P. 32(k).

It is hard to see why matters should be different in the civil context. If a civil defendant surrenders and offers the plaintiff everything in his demand for relief, that might justify entry of judgment but it does not render the case moot. Each component of Article III's case-or-controversy requirement—injury in fact, causation, and redressability—is unaffected by the defendant's offer. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). A mere *offer* of "complete relief" does not remove the injury that the plaintiff suffered; it does not change the fact that the defendant caused the injury; and it does not disable the courts from redressing that injury with judicial relief. Campbell-Ewald never so much as men-

tions these requirements of the case-or-controversy doctrine, nor does it explain how any of them is undermined by an offer of "complete relief."

Instead, Campbell-Ewald claims that Article III "demands adversity between the parties . . . at all times," and that when parties no longer lock horns over the relief sought, the federal judicial power comes to an end. Pet. Br. 10. There are many problems with this understanding of Article III's case-or-controversy requirement.

The first problem is that it would render the federal courts powerless to enter consent decrees, dismiss settled cases with prejudice, retain jurisdiction over a settlement agreement, or enter judgment after a litigant accepts a Rule 68 offer. Once parties to a case settle, there is no longer "adversity" between the parties. But if that eliminated an Article III case or controversy, then the federal courts would lack jurisdiction to do anything except dismiss the case without prejudice. *See Steel Co.*, 523 U.S. at 94; *Frederiksen v. City of Lockport*, 384 F.3d 437, 438 (7th Cir. 2004) (Easterbrook, J.) ("'No jurisdiction' and 'with prejudice' are mutually exclusive."). Yet it is common for federal courts to dismiss settled cases with prejudice, and the rules of civil procedure allow them to do so. *See* Fed. R. Civ. P. 41(a)(2); *see also* Fed. R. Civ. P. 68(a) (requiring courts to enter judgment after a litigant accepts a Rule 68 offer). Courts may also enter consent decrees upon settlement and retain jurisdiction to enforce the parties' settlement agreement. *See Rufo v. Inmates of Suffolk Cnty. Jail*, 502 U.S. 367, 378 (1992) (consent decrees); *Kokkonen v. Guardian Life Ins. Co. of*

Am., 511 U.S. 375, 381 (1994) (retaining jurisdiction over settlement agreements). But if Campbell-Ewald were right to assert that subject-matter jurisdiction disappears at the moment the parties reach quiescence, then a district court could never do any of this. It would be compelled to enter an immediate jurisdictional dismissal upon settlement of the parties.

Another problem is that this Court has repeatedly rejected Campbell-Ewald's claim that Article III requires "adversity between the parties at all times." Pet. Br. 10. *Tutun v. United States*, 270 U.S. 568 (1926), upheld the federal courts' jurisdiction over uncontested naturalization proceedings. And this Court has decided cases after the Solicitor General confessed error and joined the "opposing" party in asking this Court to reverse the judgment below. *See United States v. Providence Journal Co.*, 485 U.S. 693, 703–04 (1988).

Then there is *United States v. Windsor*, 133 S. Ct. 2675 (2013), which declared the Defense of Marriage Act unconstitutional even though the parties in that case were decidedly non-adverse.[4] *Windsor* is especially problematic for Campbell-Ewald because it explicitly holds that adverse parties are *not* required by Article III. *See id.* at 2685, 2687–88; *id.* at 2701–02 (Scalia, J., dissenting). True, *Windsor* acknowledges the absence of adversity as a "prudential" jurisdictional factor. *Id.* at 2687. But that is no help to Campbell-Ewald, which stakes its

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[4] The Bipartisan Legal Advisory Group (BLAG) had intervened to defend the statute, but the Court did not rely on BLAG's presence in its Article III analysis. *See Windsor*, 133 S. Ct. at 2684–87, 2688.

argument exclusively on Article III and makes no pretense of relying on "prudential" considerations of justiciability. *See* Pet. Br. 16 ("[A] defendant's tender of the relief sought eliminates an Article III controversy."); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1386 (2014) ("[P]rudential" justiciability factors are "not derived from Article III").

Article III courts also entertain ex parte litigation in which there is no opposing party at all. Federal statutes have authorized ex parte cases of this sort since the beginning of the republic. *See* Act of April 14, 1792, ch. 24, § 1, 1 Stat. 254 (salvage cases); Act of January 29, 1795, 1 Stat. 414 (naturalization proceedings); 15 U.S.C. § 1116(d)(1)(A) (federal courts may seize trademark-infringing goods "upon ex parte application"); *see also* Russell Wheeler, *Extrajudicial Activities of the Early Supreme Court*, 1973 Sup. Ct. Rev. 123, 132–36; James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 Yale L.J. 1346, 1349–91 (2015) (collecting examples). And the Foreign Intelligence Surveillance Act requires the government to seek surveillance warrants in closed-door ex parte proceedings before an Article III tribunal. *See* 50 U.S.C. § 1803; *id.* § 1803(b) (authorizing ex parte appeals of decisions denying a FISA warrant).

If Campbell-Ewald wants this Court to overrule *Tutun*, *Windsor*, and every case decided by this Court after the Solicitor General confessed error, and if it wants this Court to nullify the Foreign Intelligence Surveillance Act and every statute authorizing ex parte litigation in Arti-

cle III courts, then it should say so. Otherwise, Campbell-Ewald should abandon its claim that "Article III's case-or-controversy requirement demands adversity between the parties . at all times." Pet. Br. 10. As Professor Monaghan has observed:

> [I]t is difficult to assert that "real" adversaries are necessary to the existence of a case or controversy; witness, for example, default judgments, guilty pleas, consent decrees, confessions of error by the solicitor general, naturalization and bankruptcy proceedings—situations where the parties have something to gain or lose, but where they agree on the facts and/or the law.

Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1373–74 (1973) (footnote omitted).

C. There Is No Authority From This Court That Supports Campbell-Ewald's Mootness-By-Offer-Of-Complete-Relief Theory

Campbell-Ewald not only ignores the cases that reject an adverse-party requirement, it also fails to produce any cases from this Court that support its mootness-by-offer-of-complete-relief theory. The closest thing to support that Campbell-Ewald can muster is a trio of cases from the nineteenth century. Pet. Br. 16–18 (citing *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308 (1893); *San Mateo Cnty. v. Southern-Pacific R.R. Co.*, 116 U.S. 138 (1885); *Little v. Bowers*, 134 U.S. 547 (1890)). None of these rulings rely on Article III's case-

or-controversy requirement. And each long predates the modern case-or-controversy doctrine established by this Court. The idea of "injury in fact" as an Article III requirement did not appear in this Court's case law until *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150, 151–52 (1970)—and the concepts of "causation" and "redressability" emerged even later than that. *See* Cass R. Sunstein, *What's Standing After* Lujan*? Of Citizen Suits, "Injuries," and Article III*, 91 Mich. L. Rev. 163, 169, 183–91, 193–95 (1992). Before *Data Processing*, judicial inquiries into "standing" had focused on whether the law provided a cause of action—a question that is today regarded as going to the merits rather than whether an Article III case or controversy exists. *See id.* at 170–71, 173–78; *see also Steel Co.*, 523 U.S. at 96 ("[N]onexistence of a cause of action was no proper basis for a jurisdictional dismissal.").

San Pablo, *San Mateo County*, and *Little* each dismissed writs of error after a taxpayer had paid a disputed debt. The writs were dismissed not because the payments eliminated an Article III case or controversy, but because "the cause of action had ceased to exist." *San Pablo*, 149 U.S. at 313; *see also San Mateo Cnty.*, 116 U.S. at 142 ("[T]here is no longer an existing cause of action in favor of the county against the railroad company."); *Little*, 134 U.S. at 558 (relying on *San Mateo County*'s conclusion that "there was no longer an existing cause of action" after disputed taxes have been voluntarily paid). Failure to establish a cause of action goes to the merits; it does not affect whether an Article III case or controversy exists. *See Bell v. Hood*, 327 U.S.

678, 682 (1946) ("[F]ailure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction.").

Payment of a debt is a defense on the merits—not something that eliminates an Article III case or controversy. *See* Fed. R. Civ. P. 8(c) (listing "payment" as an affirmative defense). Payment may require the litigation to end,[5] but that is not because jurisdiction ceases to exist. The litigation ends because a plaintiff is *not legally entitled* to judicial relief once the defendant has paid the disputed debt. A claim can be a dead loser—in the sense that the law forecloses judicial relief—yet still satisfy Article III's case-or-controversy requirement. *See Gen. Inv. Co. v. N.Y. Cent. R.R. Co.*, 271 U.S. 228, 230 (1926) ("There may be jurisdiction and yet an absence of merits . . "). So long as it remains theoretically possible for a court to redress an alleged injury, even if the law or the facts do not permit such relief, the Article III case-or-controversy requirement is satisfied. *See Chafin v. Chafin*, 133 S. Ct. 1017, 1020 (2013) ("[P]rospects of success are . . . not pertinent to the mootness inquiry."); Oral Argument at 15:13, *Chapman*, Nos. 14-2773, 14-2775, 2015 WL 4652878, *available at* http://1.usa.gov/1MneCSu (last visited on Aug. 24, 2015) (Judge Easterbrook: "What you say is that the Court *shouldn't* award that relief, not that the Court *can't*. And mootness is supposed to be about

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[5] This is especially true in tax cases where a defendant has a right to pay its taxes unilaterally. *See San Pablo*, 149 U.S. at 312 (quoting state statute that entitled a taxpayer to extinguish its debt by depositing money in the bank in the creditor's name).

whether relief is possible, not whether it's desirable or sensible.").

To be sure, *San Pablo* goes on to say that the Court is "not empowered to decide moot questions or abstract propositions." 149 U.S. at 314; Pet. Br. 17 (quoting this passage). But the Court was not saying that the *case* had become "moot" in an Article III sense. It said that the railroad's payment made it unnecessary to opine on the legality of the tax. That was the "question" that had become "moot"—in the sense of becoming irrelevant to the outcome because either way the State would not be entitled to judicial relief. *San Pablo* is not an Article III holding, but a reflection of this Court's longstanding refusal to resolve constitutional or legal issues absent a need to do so. *Cf. Blair v. United States*, 250 U.S. 273, 279 (1919) ("Considerations of propriety, as well as long-established practice, demand that we refrain from passing upon the constitutionality of an act of Congress unless obliged to do so in the proper performance of our judicial function ... "). The same goes for *San Mateo County* and *Little*.[6]

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[6] *Massachusetts v. EPA* cites *San Pablo* to support the indisputable proposition that there is no justiciable controversy when a case becomes moot. *See* 549 U.S. 497, 516 (2007). This passing reference to *San Pablo* does not convert its holding into something it is not.

D. An Unaccepted Offer Cannot Moot A Case Because It Is Not Legally Binding On The Parties Or The Courts

There is yet another insurmountable problem with Campbell-Ewald's mootness-by-offer-of-complete-relief theory: An unaccepted offer of settlement or judgment cannot redress a plaintiff's injuries because unaccepted offers do not bind the parties or the courts. *See Genesis Healthcare*, 133 S. Ct. at 1533–34 (Kagan, J., dissenting); Brief for the United States as Amicus Curiae at 10, *Genesis Healthcare*, 133 S. Ct. 1523 (2013) (No. 11-1059).

Rule 68(b) provides that "[a]n unaccepted offer is considered withdrawn" if not accepted within 14 days. Fed. R. Civ. P. 68(b). And contract law provides that a rejected offer "leaves the matter as if no offer had ever been made." *Minneapolis & St. Louis Ry. Co. v. Columbus Rolling Mill Co.*, 119 U.S. 149, 151 (1886). Neither the plaintiff nor the courts can enforce an unaccepted or rejected offer of settlement or judgment. That means the plaintiff's injuries remain unredressed, leaving him in the same position he was in before the offer was made.

Mr. Gomez rejected Campbell-Ewald's offers, and Campbell-Ewald never denies that its rejected offers are legally unenforceable. Pet. Br. 22–24.[7] But it never explains how an unenforceable offer redressed Mr. Gomez's

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[7] Campbell-Ewald is wrong to say that "an offer of complete relief puts the plaintiff in a far better position than a default." Pet. Br. 24. A default judgment is legally enforceable; an offer of complete relief is not.

injuries. If this case were dismissed as moot in response to Campbell-Ewald's offers, Mr. Gomez would have no means of compelling Campbell-Ewald to pay damages or abide by its proposed injunction. Yet Campbell-Ewald insists throughout its brief that continued adjudication would no longer "affect the result." Pet. Br. 14, 16–17, 20 (quoting *San Pablo*, 149 U.S. at 314). That is demonstrably untrue; judicial resolution would transform an *unenforceable* offer of "complete relief" into an *enforceable* judgment of the court. That is hardly an "academic" difference. Pet Br. 13; *see also Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) ("A case becomes moot only when it is *impossible* for a court to grant *any* effectual relief whatever to the prevailing party." (emphasis added) (citation and internal quotation marks omitted)).[8]

Campbell-Ewald insists that it would gladly pay Mr. Gomez the money that it offered, even in the absence of legal compulsion. *See* Pet. Br. 21, 22 n.6. Campbell-Ewald's generosity does nothing to help its argument for mootness. First, Campbell-Ewald claims that an offer of "complete relief" *always* moots a case—regardless of

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[8] What's more, even if Campbell-Ewald's rejected offers could somehow be enforced as contractual obligations (or under promissory estoppel), that *still* is not as valuable to Mr. Gomez as a court judgment. A contractual entitlement provides only a cause of action on which one can sue. A judgment, by contrast, is judicially enforceable without the need to file and win another lawsuit. *See Kokkonen*, 511 U.S. at 381–82; *Zinni v. ER Solutions, Inc.*, 692 F.3d 1162, 1166–68 (11th Cir. 2012). So Mr. Gomez would still retain a "personal stake" in the litigation.

whether the defendant plans or promises to donate money to the plaintiff after the case is dismissed. *See* Pet. Br. 10 ("Offering a plaintiff everything he could secure through a judgment in his favor eliminates both the requisite adversity and personal stake, and thus eliminates an Article III case and controversy."). The question presented refers only to "an offer of complete relief"—not "an offer of complete relief accompanied by a good-faith intention to abide by the terms of such offer after the case is dismissed." Pet. Br. i. If Campbell-Ewald must rely on its (non-binding) assurance that it will pay Mr. Gomez, then the answer to the first question presented must be "no": A mere offer of "complete relief" does *not* render a case moot.

Second, there is *still* a distinction between non-binding intentions and legally binding commitments. One can assume that Campbell-Ewald is acting in good faith when it says that it will pay Mr. Gomez and abide by the terms of the proposed injunction. *See* Pet. App. 55a–56a; 60a–61a. But that statement does not bind future management, and if it chooses to renege Mr. Gomez will be unable to seek contempt sanctions or sue for breach of contract. That alone shows that Mr. Gomez—and every plaintiff who rejects an offer of "complete relief"—retains a "personal stake" in the litigation. The court's continued adjudication will "affect the result" by converting a non-binding expression of intent into a legally enforceable judgment. Indeed, that is precisely why this Court refuses to issue mootness dismissals in response to a defendant's "voluntary cessation" of challenged conduct. *See Knox*, 132 S. Ct. at 2287 ("The voluntary cessa-

tion of challenged conduct does not ordinarily render a case moot because a dismissal for mootness would permit a resumption of the challenged conduct as soon as the case is dismissed.").

Campbell-Ewald's next move is to suggest that even if its offer is legally unenforceable, *San Pablo* holds that a case becomes moot if "the defendant's tender would provide the plaintiff complete relief—*regardless* of whether the plaintiff has accepted the offer." Pet. Br. 22. *San Pablo* holds no such thing. It was the *payment* of the debt that led that *San Pablo* to declare that "the cause of action has ceased to exist." 149 U.S. at 313. The relevant passage provides:

> Any obligation of the defendant to pay to the state the sums sued for in this case, together with interest, penalties, and costs, has been extinguished by the offer to pay all these sums, *and* the deposit of the money in a bank, which by a statute of the state have the same effect as actual payment and receipt of the money; and the state has obtained everything that it could recover in this case by a judgment of this court in its favor.

Id. at 313–14 (emphasis added). The passage uses "and" to conjoin the offer, the payment and receipt of the money, and the State's recovery of everything it could obtain in court. And of course, as we have already explained, *San Pablo*'s disposition did not even rely on Article III. The taxpayer's payment eliminated a viable cause of action, which is a far cry from eliminating an Article III case or controversy. *See* Part I.C, *supra*.

Finally, even an *accepted* offer of settlement does not moot a case. Settlement allows courts to dismiss with prejudice, which is impermissible after a case has become moot. *See supra* at 20–21. What's more, Rule 68(a) *requires* a court to enter judgment after a litigant accepts a Rule 68 offer; if the case becomes moot upon acceptance of that offer, then Rule 68(a) is unconstitutional. And if someone tries to re-litigate a claim that has settled, that effort is precluded by res judicata or accord and satisfaction, not by lack of an Article III case or controversy. *See Chapman*, 2015 WL 4652878, at *7 ("[E]ven a defendant's proof that the plaintiff has *accepted* full compensation ('accord and satisfaction' in the language of Rule 8(c)(1)) is an affirmative defense rather than a jurisdictional bar "). One should not confuse a judicial duty to conclude the litigation with a lack of jurisdiction over the controversy.[9]

E. The Courts Have No Authority To Impose A Forced Entry Of Judgment In Response To Campbell-Ewald's Offers

Nothing we have said to this point addresses whether a court may enter *judgment* after an offer of "complete relief." We have considered only whether an offer of complete relief eliminates an Article III case or controversy and renders the case moot—the sole issue in the

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[9] To the extent that previous opinions assume or suggest that settlement "moots" a case, we respectfully ask the Court to clarify that it does not. *See Genesis Healthcare*, 133 S. Ct. at 1529 n.4; *Bancorp*, 513 U.S. at 20; *Roper*, 445 U.S. at 332.

first question presented. But Campbell-Ewald suggests that the district court might have entered judgment for Mr. Gomez in response to its offers. Pet. Br. 10, 21. This is mistaken, and the Court should soundly reject any possibility of a forced entry of judgment (or forced settlement) on remand.

There may be rare situations in which courts may override litigant autonomy and force a plaintiff to accept a settlement or entry of judgment against his wishes. The only circumstance in which that is appropriate, however, is when a defendant "unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory." *Genesis Healthcare*, 133 S. Ct. at 1535–36 (Kagan, J., dissenting). It is hard to imagine this would ever happen, given Rule 68(d)'s cost-shifting provision. But a spiteful or judgment-proof litigant might be willing to incur those costs, and a court need not entertain bootless litigation at public expense.

There is no justification whatsoever for a forced entry of judgment in *this* case. First, Campbell-Ewald's offers failed to meet Mr. Gomez's demands for relief. Neither offer consented to class certification, and neither offer provided the attorneys' fees that Mr. Gomez had demanded. Pet. App. 52a–56a; 57a–61a. "Complete relief" is defined by what the plaintiff demands, not by what the defendant thinks the plaintiff is entitled to recover. *See Smith v. Greystone Alliance, LLC*, 772 F.3d 448, 451 (7th Cir. 2014) (Easterbrook, J.) ("[A] court must resolve the merits unless the defendant satisfies the plaintiff's demand. An offer that the defendant or the judge believes sufficient, but which does not satisfy the

plaintiff's demand, does not justify dismissal."). Campbell-Ewald's proposed injunction also falls short of complete relief. Mr. Gomez demanded an injunction against "all wireless spam activities"; Campbell-Ewald offered a vague obey-the-law injunction that merely restates the TCPA's prohibitions. Pet. App. 56a, 61a; *see also* Brief of Amicus Legal Aid Soc'y of the District of Columbia et al.; *EEOC v. AutoZone, Inc.*, 707 F.3d 824 (7th Cir. 2013) (obey-the-law injunctions not judicially enforceable).

Campbell-Ewald's offers fall short of "complete relief" for yet another reason: Mr. Gomez sued as a class representative and demanded class-wide relief. J.A. 16–17 ("Gomez brings this class action complaint to obtain redress for all persons injured by [Campbell-Ewald's] conduct."). It is specious for Campbell-Ewald to suggest that offering relief only to one member of that putative class constitutes "complete relief" requiring a forced entry of judgment. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 341 (1980) (Rehnquist, J., concurring) (when a defendant offers a plaintiff seeking to proceed as a class representative individual relief only, "the defendant has not offered all that has been requested in the complaint (*i.e.*, relief for the class)"). If Campbell-Ewald wants Mr. Gomez to abandon his quest for class-wide relief in exchange for payment, then it must bargain for that consistent with principles of mutual assent. *See Genesis Healthcare*, 133 S. Ct. at 1536 (Kagan, J., dissenting).[10]

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[10] *See Tanasi v. New All. Bank*, 786 F.3d 195, 200 (2d Cir. 2015) ("[T]he district court should not enter judgment against the defend-

(continued...)

Second, Mr. Gomez had good reason for rejecting Campbell-Ewald's settlement offer: He sued as the representative of a class, and no suitable class representative would cut a deal that gives himself full recovery at the expense of the class members that he seeks to represent. Indeed, any class representative who accepts such a "bargain" would flunk Rule 23's adequacy-of-representation requirement. *See* Fed. R. Civ. P. 23(a)(4) (representative parties must "fairly and adequately protect the interests of the class."). Campbell-Ewald tries to paint Mr. Gomez's rejection of its settlement offers as something akin to champerty and maintenance. But it is the very nature of *representative* litigation for the lead plaintiff to pursue recovery *for the class*—even if that comes at some cost or delay to his personal recovery. Having presented himself to the court as an adequate representative of those injured by Campbell-Ewald, Mr. Gomez cannot turn around and accede to a deal that gives himself a full recovery while his fellow class members go begging. And there is no basis for Campbell-Ewald to equate the rejection of its offers with the liti-

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ant if it does not provide complete relief," including relief on the plaintiffs' class claims); *Charvat v. Nat'l Holdings Corp.*, No. 2:14-cv-2205, 2015 WL 3407657, *7 (S.D. Ohio May 26, 2015) ("Plaintiff's *demand* ... includes the relief sought on behalf of the putative class—regardless of whether Plaintiff has a legal interest in representing the class before it is certified," and a settlement proposal that offers relief only on the plaintiff's individual claims "does not purport to satisfy that demand" and "does not mandate that the Court enter judgment in Plaintiff's favor over his objection.").

gious or intransigent behavior that might justify a forced entry of judgment.

Third, Mr. Gomez has material interests in continuing the litigation. If a class is certified, Mr. Gomez can share the lawyers' bill with other class members rather than bearing those costs by himself. *See Roper*, 445 U.S. at 333–34 & n.6. Mr. Gomez also stands to recover an incentive award as the class representative if the case settles. *See Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 874–75 (7th Cir. 2012). It is up to Mr. Gomez to decide whether to give up these pursuits in exchange for Campbell-Ewald's settlement offer. No federal court has the authority to make that decision for him.

Finally, even if the district court had forced Mr. Gomez to accept judgment on his individual claims, that would not render those individual claims "moot." Campbell-Ewald thinks that a forced entry of judgment would remove jurisdiction and eliminate an Article III case or controversy. Pet. Br. 22 ("The entry of such a judgment itself ends any 'live' controversy."). That is wrong. Entry of judgment may conclude the litigation, but it does not affect subject-matter jurisdiction over the claims. If Mr. Gomez tried to reinstitute his individual claims after the forced entry of judgment, they would be barred by res judicata, not for lack of jurisdiction. Mr. Gomez would still be alleging a claim that arises under federal law, and he would satisfy Article III by alleging an injury (an unlawful text message), caused by Campbell-Ewald, that *could* be redressed with judicial relief (damages). That he has already litigated and prevailed is a preclusion defense that goes to the merits, not to whether a case or

controversy exists. *See Ill. Cent. R.R. Co. v. Adams*, 180 U.S. 28, 32 (1901). So even if the district court had entered judgment on Mr. Gomez's individual claims, that would not "moot" those claims, and it would not allow Campbell-Ewald to argue that *Genesis Healthcare* moots the class claims as well.

For good measure, a forced entry of judgment on Mr. Gomez's individual claims would not moot the class claims either. *Roper* allowed a class representative to appeal a denial of class certification—*after* the district court had imposed a forced entry of judgment on the representative's individual claims. *See Roper*, 445 U.S. at 329–30. *Roper* held that the representative retained an Article III stake in the class-certification decision because certification would allow him to share the lawyers' bill with the other class members. *See id.* at 333–34 & n.6. Mr. Gomez would retain the same Article III interest in seeking class certification from the district court after a forced judgment on his individual claims.[11]

II. CAMPBELL-EWALD'S OFFERS DO NOT MOOT THE CLASS CLAIMS

Campbell-Ewald's analysis of the second question assumes that an offer of "complete relief" moots a case. It further assumes that its offers to Mr. Gomez qualified as

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[11] Mr. Gomez moved for certification on January 19, 2011, before any court had entered judgment, and *Roper* would allow certification to "relate back to the time of the original motion for certification." 445 U.S. at 330 n.3.

"complete relief" that mooted his individual claims. Each of those assumptions is false. *See* Part I, *supra*. So there is no need to rule on whether a not-yet-certified class claim can save an otherwise moot case. But even if one *assumes* that Mr. Gomez's individual claims became "moot," Campbell-Ewald *still* cannot show that the class claims are moot.

Mr. Gomez retains two material interests in the class-certification decision. First, certification will allow Mr. Gomez to share the lawyers' bill with other class members. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333–34 & n.6. Second, certification will allow Mr. Gomez to seek an incentive award if the case settles. *See Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 874–75 (7th Cir. 2012) (Posner, J.). Campbell-Ewald never denies that Mr. Gomez holds these financial stakes in the class-certification decision. But it never explains why these interests cannot preserve the Article III case or controversy that existed at the outset of the lawsuit. The cases that it cites (including *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013)) do not consider or resolve whether these financial interests can sustain a representative's class claims after his individual claims become moot.

Campbell-Ewald bears the "heavy" burden of demonstrating mootness. *Cnty. of L.A. v. Davis*, 440 U.S. 625, 631 (1979). So it must address Mr. Gomez's undeniable financial interests in certification. And it must do so in light of the distinction between mootness and standing; mootness doctrine is more likely to allow probabilistic or speculative injuries to sustain a case or controversy. *See*

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189–92 (2000).

Campbell-Ewald's argument for mootness is also foreclosed by *Roper*'s specific disapproval of its efforts to evade class certification by offering "complete relief" to the representative plaintiff:

> Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.

445 U.S. at 339. Campbell-Ewald is trying to do exactly what *Roper* disapproved: Decapitate the class by mooting out the representative's claims before the district court can rule on certification—and then repeat the cycle as soon as a new representative plaintiff emerges.[12]

Campbell-Ewald does not ask the Court to overrule *Roper*, and it does not even acknowledge this passage from *Roper*. Instead, Campbell-Ewald acts as if *Genesis Healthcare* compels dismissal if Mr. Gomez's individual

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[12] Campbell-Ewald also induced the district court to delay its certification decision by stipulating to an extension of Mr. Gomez's deadline for filing his motion for class certification. *See supra* at 8 n.2. Campbell-Ewald's effort to moot the case during that agreed-upon window of time borders on sandbagging.

claims became moot before certification. Pet. Br. 26–28. But *Genesis Healthcare* holds only that a plaintiff whose claims become moot may not pursue a collective action under the Fair Labor Standards Act. *See* 29 U.S.C. § 216(b) (allowing an employee to sue on behalf of himself and "other employees similarly situated."). *Genesis Healthcare* did not overrule *Roper*, and it avoided any collision with *Roper* by insisting throughout its opinion that *class* actions under Rule 23 were distinguishable from *collective* actions under the FLSA. *See* 133 S. Ct. at 1529 ("[C]ases that [arise] in the context of [Rule] 23 class actions . . . are inapposite . . . because Rule 23 actions are fundamentally different from collective actions under the FLSA."); *see also id.* at 1527 n.1 ("[T]here are significant differences between certification under [Rule] 23 and the joinder process under § 216(b)."); *id.* at 1532 (distinguishing *Roper* by limiting it "to the unique significance of certification decisions in class-action proceedings"); *id.* ("Whatever significance 'conditional certification' may have in § 216(b) proceedings, it is not tantamount to class certification under Rule 23."). More importantly, *Genesis Healthcare* never considered or addressed whether a representative plaintiff *with a financial stake* in the class-certification decision may seek certification after his individual claims become moot.

Campbell-Ewald refuses to acknowledge these statements from *Genesis Healthcare* and insists that class actions are indistinguishable from FLSA collective actions. Pet. Br. 11, 27–28. Indeed, Campbell-Ewald goes so far as to alter a passage from *Genesis Healthcare* by replacing "collective-action allegations" with "[class]-

action allegations." Pet. Br. 29. Campbell-Ewald cannot maintain that stance when *Genesis Healthcare* took such pains to distinguish the collective action in that case from the class action at issue in *Roper*. Campbell-Ewald would have us believe that *Genesis Healthcare*'s efforts to distinguish class actions were all tongue-in-cheek—and that the Court's opinion should be construed to repudiate an opinion that it went out of its way to distinguish.

We recognize that *Genesis Healthcare* described as "dictum" the passage from *Roper* that disapproved Campbell-Ewald's "pick off" maneuver—even as it distinguished *Roper* as inapplicable to collective actions brought under the FLSA. *See* 133 S. Ct. at 1532. But Campbell-Ewald does not urge that *Roper* be disregarded on that ground. And even if this passage from *Roper* could be characterized as "dictum," Campbell-Ewald must still present an *argument* for why this supposed dictum should be ignored. The burden of persuasion always rests with the litigant who is urging the Court to depart from its prior opinions. *See Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("[A]ny departure from the doctrine of *stare decisis* demands special justification."). It would be extraordinary for this Court to overrule or cut back on *Roper* when: (1) Campbell-Ewald has not asked the Court to reconsider *any* part of *Roper*;[13] (2) Campbell-Ewald presents no argument criticizing *Roper*'s analysis; and (3) *Genesis Healthcare* went out of its way

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[13] *See Bank of America, N.A. v. Caulkett*, 135 S. Ct. 1995, 1999–2000 & n. (2015) (refusing to reconsider *Dewsnup v. Timm*, 502 U.S. 410 (1992), because the petitioners did not ask the Court to overrule it).

to distinguish *Roper* as a case involving class actions rather than collective actions under the FLSA.

Finally, a comment on Campbell-Ewald's "[p]olicy concerns about class action practice"—which it acknowledges are irrelevant to the scope of Article III but nevertheless offers in a concededly gratuitous discussion. Pet. Br. 33–35.

Campbell-Ewald is wrong to assert that the absent class members "likely could do no worse than to be yoked to the binding class certification sought" by Mr. Gomez. Pet. Br. 34. If this Court allows Campbell-Ewald to moot the class action, then the best recovery that any absent class member can hope for is $1,503 *with no attorneys' fees*. *See* 47 U.S.C. § 227(b)(3). It is hard to imagine this payoff could exceed the costs of retaining an attorney, and no attorney will provide contingency-fee representation in a purely individual case for such a small recovery.

Campbell-Ewald suggests that absent class members might sue *pro se* in small-claims court. Pet. Br. 3. But there are many out-of-pocket and opportunity costs of small-claims litigation, including: tracking down the sender of the text message from an unidentified SMS number; paying filing fees; drafting and serving the complaint; traveling to the courthouse; and preparing for and attending the hearing and subsequent appeals. *See* Bruce Zucker & Monica Her, *The People's Court Examined: A Legal and Empirical Analysis of the Small Claims Court System*, 37 U.S.F. L. Rev. 315 (2003). All this for the *chance* of a $500 payoff—that *might* be trebled to $1,500 if one can prove an intentional violation.

Campbell-Ewald also holds the prerogative to remove to federal district court. *See Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740 (2012). So no litigant could obtain the cost savings of small-claims court unless Campbell-Ewald agreed to litigate in that forum. Finally, TCPA plaintiffs must prove that the defendant used an "automatic telephone dialing system," which often requires expert testimony and analysis of the defendant's phone systems. *See Sherman v. Yahoo! Inc.*, 997 F. Supp. 2d 1129, 1135–36 (S.D. Cal. 2014). No plaintiff will incur those costs for the prospect of a $500 or $1,500 recovery.

Campbell-Ewald tries to show itself as the champion of absent class members by complaining that "the typical TCPA settlement offers absent class members a small fraction of the statutory damages they might recover . . . and saddles them with unnecessary attorneys' fees." Pet. Br. 34. But recovering "pennies on the dollar" *after* attorneys' fees is often preferable to a "full" recovery of $1,503 *before* paying the lawyer's bill and other costs of an individual lawsuit. That's why so many absent class members decline their opportunity to "opt out"; bringing an individual lawsuit isn't worth their time. Campbell-Ewald also neglects to mention that class members get to *choose* whether to allow Mr. Gomez to litigate on their behalf, or opt out and pursue their individual claims. *See* Fed. R. Civ. P. 23(c)(3)(B). Normally the law assumes that mentally competent adults act in their rational self-interest. *See* Richard A. Posner, *Economic Analysis of Law* 4 (9th ed. 2014). Yet Campbell-Ewald would have us believe that absent class members who decline to "opt out" from TCPA lawsuits are acting contrary to their

self-interest—and therefore should have their choice taken away by a revisionist "mootness" regime that would make it all but impossible to litigate TCPA lawsuits as class actions.

Even if Campbell-Ewald were right to assert that TCPA class actions hurt rather than help absent class members, the remedy is to amend Rule 23 or the Class Action Fairness Act or the TCPA—or require stricter judicial scrutiny of class-action settlements. It is not to issue a finding of "mootness" in a case that is transparently not moot.

III. CAMPBELL-EWALD IS NOT ENTITLED TO "DERIVATIVE SOVEREIGN IMMUNITY"

Campbell-Ewald correctly observes that the Navy cannot be sued under the TCPA, because there is no statute waiving sovereign immunity for TCPA lawsuits. Pet. Br. 2. But Campbell-Ewald further contends that the Navy's sovereign immunity should carry over to contractors acting on the Navy's behalf. Pet. Br. 3, 11–12, 35–50. Campbell-Ewald calls this "derivative sovereign immunity," and the idea goes something like this: If the government can't be sued for violating a federal law, then neither can those who violate that law while performing services for the government. Campbell-Ewald's claim of "derivative sovereign immunity" fails for two independent reasons.

First, there is no "derivative sovereign immunity" for government agents or contractors who violate federal

law.[14] Second, "derivative sovereign immunity" cannot extend to actions that violate the sovereign's specific instructions. *Yearsley v. W. A. Ross Construction Co.*, 309 U.S. 18 (1940), protects contractors only for acts that "execut[e] [Congress's] will," and Campbell-Ewald's alleged TCPA violations *contravened* the will of both Congress and the executive. *Id.* at 21.

A. Campbell-Ewald Cannot Claim "Derivative Sovereign Immunity" For Acts That Violate A Federal Statute

The jurisprudence of officer liability precludes "derivative" sovereign immunity for government agents who violate federal law. *See Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687 (1949) ("In a suit against the officer to recover damages for the agent's personal actions, . . . [t]he judgment sought will not require action by the sovereign or disturb the sovereign's property. There is, therefore, no jurisdictional difficulty."); Louis L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity*, 77 Harv. L. Rev. 1, 20 (1963) ("It early became clear that a suit against an officer was not forbidden simply because it raised a question as to the legality of his action as an agent of gov-

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[14] The parties dispute whether Campbell-Ewald's contract established an "agency" relationship with the Navy, and the lower courts did not resolve this question. Pet. App. 32a–34a. But Campbell-Ewald's immunity argument fails regardless of whether Campbell-Ewald acted as an "agent" or "independent contractor." One can assume an agency relationship, but we do not concede that point.

ernment . . . ."). Campbell-Ewald's theory of "derivative" sovereign immunity is incompatible with this doctrine and contradicts some of this Court's most canonical decisions.

The first obstacle to Campbell-Ewald's theory of "derivative sovereign immunity" is *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). The federal government enjoys sovereign immunity for constitutional torts. *See FDIC v. Meyer*, 510 U.S. 471, 477–78 (1994) (Federal Tort Claims Act does not waive sovereign immunity for constitutional violations). Yet the government's sovereign immunity does not shield federal agents who violate constitutional rights while acting on the government's behalf. *See Bivens*, 403 U.S. at 390–91; *Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 72 (2001) (noting that federal prisoners in BOP facilities "may bring a *Bivens* claim against the offending individual officer," but "may not bring a *Bivens* claim against the officer's employer, the United States, or the BOP"); *United States v. Lee*, 106 U.S. 196 (1882). Indeed, this Court regards the government's sovereign immunity as something that *supports* an implied right of action against federal officers, because otherwise injured plaintiffs could be left without a remedy. *See Meyer*, 510 U.S. at 485 ("[W]e implied a cause of action against federal officials in *Bivens* in part *because* a direct action against the Government was not available."); *Bivens*, 403 U.S. at 410 (Harlan, J., concurring in the judgment) ("[T]he sovereign still remains immune to suit. For people in Bivens' shoes, it is damages or nothing."). That is antithetical to Campbell-

Ewald's belief that the government's sovereign immunity should *block* lawsuits against those who act on its behalf.

Of course, federal officers sued under *Bivens* may assert *qualified* immunity if they did not violate a clearly established right. *See Wood v. Moss*, 134 S. Ct. 2056 (2014). But the idea that they might assert "derivative sovereign immunity" based on their agency relationship with the government—an immunity that would shield them not only for reasonable mistakes but for *any* constitutional violation—is a non-starter in *Bivens* litigation. *See Malesko*, 534 U.S. at 70 ("The purpose of *Bivens* is to deter individual federal officers from committing constitutional violations.").

Campbell-Ewald does not acknowledge *Bivens* but seems to have crafted its argument to avoid direct conflict with that decision. It says, for example, that "government contractors" may assert derivative sovereign immunity when they violate federal law. Pet. Br. 37. But it remains conspicuously silent on whether government *officers* or *employees* may do so. If Campbell-Ewald hopes to avoid a clash with *Bivens* by limiting "derivative sovereign immunity" to contractors, then it must explain why a contractor should enjoy a more robust "derivative" immunity than a federal employee. Both have been "retained by the government to work on its behalf." Pet. Br. 35. And if anything, the employee should have a stronger claim to "derivative" immunity, because the employee has a closer relationship with the government. *See* 28 U.S.C. § 2671; *Logue v. United States*, 412 U.S. 521 (1973).

The second obstacle to Campbell-Ewald's "derivative sovereign immunity" theory is *Ex parte Young*, 209 U.S. 123 (1908). *Young* holds that a State cannot authorize its officials to violate federal law—and that any official who does so is stripped of the "sovereign immunity" that would otherwise attach to his office:

> [H]e is in that case stripped of his official or representative character and is subjected in his person to the consequences of his individual conduct. The State has no power to impart to him any immunity from responsibility to the supreme authority of the United States.

209 U.S. at 159–60. If state officers cannot violate federal law and retain their immunity from suit, then it is hard to see how federal contractors can violate federal law and assert "derivative sovereign immunity" from private lawsuits. One would think that the alleged violation of federal law would "strip" that immunity—at least if *Young*'s rationale is to remain good law.

The third obstacle to "derivative sovereign immunity" is the Westfall Act, which gives federal employees statutory immunity for state-law torts, but specifically withholds that immunity from employees who violate federal statutes. *See* 28 U.S.C. § 2679(b)(2)(B). Campbell-Ewald's theory of "derivative sovereign immunity" is incompatible with this statutory regime.

Campbell-Ewald never acknowledges the Westfall Act, yet it misleadingly claims that Naval officers would be "entitled to immunity from suit" if they had sent the text messages themselves. Pet. Br. 44. What Campbell-Ewald means to say is that Naval officers who violate the

TCPA might assert *qualified* immunity—an immunity that extends only to money damages—*if* they show that they did not violate clearly established rights. Pet. Br. 44 (citing only qualified-immunity cases to support its "immunity" claim for Naval officers). But Campbell-Ewald is not claiming qualified immunity, so it is a non-sequitur to rely on the theoretical possibility that Naval officers might assert qualified immunity for TCPA violations. Far more significant is that those Naval officers would *not* enjoy the "derivative sovereign immunity" that Campbell-Ewald is claiming in this case—an immunity that would shield them from *all* TCPA liability for acts taken on behalf of the Navy.

Campbell-Ewald's strategy throughout its brief is to invoke *qualified*-immunity arguments and cases to support its *absolute*-immunity defense—in the hope that this Court will follow its lead by treating all immunity defenses as fungible. That is untenable. Campbell-Ewald has never asserted qualified immunity in this case. It did not raise qualified immunity in its answer; the parties have taken no discovery on qualified-immunity issues; and Campbell-Ewald did not seek summary judgment on the ground that it committed a reasonable mistake of law. Campbell-Ewald sought immunity *solely* on the ground that the Navy's sovereign immunity should carry over to contractors who act on its behalf. *See* Mem. Supp. Def.'s Mot. Summ. J. at 8–10, ECF No. 116. *That* is the argument that the district court accepted, the court of appeals rejected, and this Court granted certiorari to resolve. Campbell-Ewald's efforts to smuggle qualified-immunity arguments into this case and obfuscate the dis-

tinction between qualified immunity and derivative sovereign immunity are demonstrably improper. *See* Sup. Ct. R. 14.1(a); *Day v. McDonough*, 547 U.S. 198, 217 (2006) ("Ordinary civil practice does not allow a forfeited affirmative defense whose underlying facts were not developed below to be raised for the first time on appeal.").[15]

The fourth and final obstacle to Campbell-Ewald's "derivative sovereign immunity" argument is the Constitution itself. Federal statutes such as the TCPA are the "supreme Law of the Land," and the executive must "take Care that the Laws be faithfully executed." U.S. Const. art. VI, cl. 2; *id.* art. II, § 3. The notion that the executive can instruct its contractors to violate an act of Congress and immunize them from liability is incompatible with legislative supremacy under the Constitution. The doctrine of sovereign immunity is designed to ensure Congress's control over the federal treasury, not to empower the executive and its delegates to flout congressional enactments. *See* U.S. Const. art. I, § 9, cl. 7. Does Campbell-Ewald think the CIA can authorize or instruct its contractors to torture detainees in foreign countries—while promising them "derivative sovereign immunity" if someone sues? *See* 18 U.S.C. § 2340A; 28 U.S.C. § 2680(k).

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[15] In addition, qualified immunity extends only to money damages; it cannot support summary judgment when Mr. Gomez is seeking both damages and injunctive relief. *See Morse v. Frederick*, 551 U.S. 393, 400 n.1 (2007).

Perhaps Campbell-Ewald will respond by saying that immunity can attach only when there has been a "constitutionally valid authorization," and that a directive to violate the anti-torture statute is never, under any circumstance, a "constitutionally valid" authorization. Pet. Br. 37. But that is equally true of *every* act of Congress that comports with the Constitution. *See* U.S. Const. art. VI, cl. 2; *id.* art. II, § 3. The executive can no more "authorize" its contractors to violate the TCPA than it can "authorize" them to violate RICO, the Foreign Corrupt Practices Act, the anti-torture statute, or the Constitution itself. At most, the executive can shield its agents from civil or criminal penalties by refusing to bring enforcement actions or issuing preemptive pardons. But the executive cannot instruct or invite its contractors to violate a constitutional federal statute, and a putative dispensation from the executive is no defense to a private right of action established by Congress.

So Campbell-Ewald loses either way. If the Navy had "authorized" Campbell-Ewald to violate the TCPA, then that flunks the "constitutionally valid authorization" test that Campbell-Ewald has propounded. Pet. Br. 37. And if the Navy didn't "authorize" violations of the TCPA, then Campbell-Ewald should be susceptible to liability—just like a government employee who violates a federal statute or constitutional provision within the scope of his employment. *See* 28 U.S.C. § 2679(b)(2); *Bivens*, 403 U.S. 388. Government contractors must obey all federal statutes that comport with the Constitution, regardless of whether they think they have permission from the executive to violate them.

None of this is to suggest that federal contractors can *never* claim immunity when they are sued for acts that arise out of their contract. For example, contractors might assert qualified immunity for reasonable mistakes of law. *See Filarsky v. Delia*, 132 S. Ct. 1657 (2012). But Campbell-Ewald is not claiming qualified immunity, and it waived that defense by not raising it in its answer or at summary judgment.[16] *Filarsky* offers no support for the idea that government agents, employees, or contractors might claim a "derivative sovereign immunity" that extends beyond reasonable mistakes of law. Campbell-Ewald does not even acknowledge that *Filarsky* was a qualified-immunity case until page 48 of its brief, and then only in a parenthetical. Yet it repeatedly cites *Filarsky* as if it had conferred an absolute immunity akin to the "derivative sovereign immunity" that Campbell-Ewald asserts in this case. Pet. Br. 36–39.

Federal contractors might also assert a preemption defense if their contract specifically requires something that state law proscribes. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 512 (1988) (preempting state-law design-defect claims against federal contractors when "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were

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[16] It is also far from clear that Campbell-Ewald, as a "private company subject to competitive market pressures," would even be entitled to assert qualified immunity. *Richardson v. McKnight*, 521 U.S. 399, 409 (1997).

known to the supplier but not to the United States."). But *Boyle*'s preemption defense is unavailable to contractors who violate *federal* statutes. And the executive cannot authorize its agents to violate a constitutional congressional enactment. *See* U.S. Const. art. II, § 3; *id.* art. VI, cl. 2. No federal contract can ever "preempt" a private right of action established by Congress. *Cf. POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2236–38 (2014) (holding that a statutory right of action created by Congress may be barred by executive agency action only when Congress has enacted legislation evincing an intent to preclude the action in those circumstances).

Finally, *Yearsley* holds that contractors may escape liability for actions that "execut[e] [Congress's] will." 309 U.S. at 21. In disallowing a lawsuit brought against a government contractor who had built a dike that eroded the plaintiff's land, *Yearsley* emphasized that the dike had been authorized by an act of Congress. *Id.* at 20 ("[T]he work thus authorized and directed by the governmental officers was performed pursuant to the Act of Congress of January 21, 1927, 44 Stat. 1010, 1013."). Then the Court declared:

> [I]f this authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will.

Id. at 20–21. To the extent that a contractor's actions are congressionally authorized, then state law must give way, and any "takings" caused by congressionally authorized projects must be litigated against the federal govern-

ment in the Court of Federal Claims. *Id.* at 21–22; *E. Enters. v. Apfel*, 524 U.S. 498, 520 (1998) ("[A] claim for just compensation under the Takings Clause must be brought to the Court of Federal Claims in the first instance, unless Congress has withdrawn the Tucker Act grant of jurisdiction in the relevant statute." (citation omitted)).

Like Campbell-Ewald, we doubt that *Yearsley*'s holding can be limited to "public works projects," as the court of appeals suggested. Pet. App. 15a. *Yearsley* focused on the fact that the contractor was "executing [Congress's] will," and those situations may extend beyond public works. But *Yearsley* cannot support "derivative sovereign immunity" for a contractor who violates an act of Congress. Such a contractor is violating rather than executing Congress's will—and falls outside the protection of *Yearsley* for that reason alone. For Campbell-Ewald to invoke *Yearsley*, it would have to point to a congressional enactment that both authorized Campbell-Ewald's advertising campaign *and* implicitly repealed the restrictions in the TCPA. Campbell-Ewald does not attempt to make that showing.

Yearsley did not establish or recognize the idea of "derivative sovereign immunity"—a phrase that appears nowhere in *Yearsley* or in any opinion of this Court. The lower-court decisions that confer "derivative sovereign immunity" are using a misnomer that this Court should repudiate. The government's sovereign immunity does not extend to employees, agents, or contractors who act on its behalf. Government-contractor defenses should be analyzed as preemption questions, in which the contractor must rely on the preemptive force

of congressional authorization (*Yearsley*) or a specific contractual obligation to the executive (*Boyle*).

B. Campbell-Ewald Cannot Claim "Derivative Sovereign Immunity" For Acts That Violate The Navy's Specific Instructions

Even if this Court were inclined to create a new doctrine of "derivative sovereign immunity" for federal contractors (but not employees?) who violate federal law, that immunity would not help Campbell-Ewald because the Navy did not authorize anyone to violate the TCPA. Campbell-Ewald's contract with the Navy required compliance "with all applicable Federal laws." J.A. 220. And the Navy specifically directed Campbell-Ewald to send text messages only to those who had "opted in" to receive them. J.A. 42.

Campbell-Ewald repeatedly claims that the Navy "approved Campbell-Ewald's work." Pet. Br. 1, 3; *see also id.* at 5 ("approved" Campbell-Ewald's "plan"); *id.* at 12 ("[T]he text message campaign targeted by Plaintiff was developed by Campbell-Ewald . . . and was specifically approved by Naval officers."). Those statements are (at best) imprecise. The Navy approved the *content* of the text message. J.A. 40–41, 72. But the Navy never approved—indeed, it expressly *disapproved*—the sending of text messages to nonconsenting recipients. According to Lee Buchschacher, the Navy's Rule 30(b)(6) witness:

> It was our policy that any list procured by Campbell-Ewald had to be people that had opted in in some way to receive information

> about money for college, career opportunities, travel or adventure or some sale of the Navy. . . . [I]f these people haven't opted in, then you know, we would be in trouble not only nationally but also locally. So it was our request that any list that they got would be opted in.

J.A. 42–43; *see also* J.A. 44 ("Q. . . . Campbell-Ewald was not authorized that you know of to send text messages to individuals who had not opted in? A. No, they were not."). Buchschacher also testified that he would not have approved Campbell-Ewald's plan had he known that it would result in violations of the TCPA. J.A. 45. Finally, the "plan" that the Navy "approved" specified that the text messages would be delivered "to the cell phones of 150,000 adults 18 to 24 *from an opt-in list* of over 3 million." J.A. 41–42 (emphasis added). So the Navy's "approval" of Campbell-Ewald's "plan" was based on the understanding that the text messages would be sent only to recipients on that opt-in list. *See* J.A. 43 ("It was my understanding this was a kosher list.").

"Derivative sovereign immunity" cannot shield actions that violate the government's specific instructions. Even in *Boyle*, which allowed a government contractor to escape liability under state law, this Court was careful to limit its holding to situations in which "(1) the United States approved reasonably precise specifications" and "(2) the equipment conformed to those specifications." *Boyle*, 487 U.S. at 512; *see also Yearsley*, 309 U.S. at 21 ("[T]here is no liability on the part of the contractor for executing [Congress's] will."). Neither *Boyle* nor *Yearsley* even remotely supports the idea of contractor im-

munity for actions that contradict the government's explicit directions. And Campbell-Ewald cites no case from any court that has conferred immunity in that situation.

Indeed, Campbell-Ewald seems determined to sweep this problem under the rug. Its brief never so much as mentions the contractual provision requiring compliance with "all applicable Federal . . . laws." J.A. 220. Nor does it acknowledge that the Navy specifically instructed it to send text messages only to those who had "opted in" to receive them. J.A. 42–45. Instead, Campbell-Ewald points the finger at MindMatics and tries to disclaim responsibility for the botched text-messaging campaign. Pet. Br. 46–47. That has nothing to do with whether Campbell-Ewald can claim "derivative sovereign immunity" for its alleged violations of the TCPA.

Derivative sovereign immunity is an affirmative defense; it is not concerned with whether Campbell-Ewald actually violated the TCPA. *See* 5 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 1270 (3d ed. 1998). In ruling on this affirmative defense, a court must *assume* that Campbell-Ewald violated the TCPA, and ask whether that assumed violation can be excused on the ground that the Navy authorized or commanded it. One does not establish an affirmative defense by saying "I didn't do it" or "You sued the wrong defendant." Those are denials, not affirmative defenses, and they are outside the question presented. So even if Campbell-Ewald could *prove* that it bears no responsibility for MindMatics's actions, that would do

nothing to advance its affirmative defense of derivative sovereign immunity.[17]

Campbell-Ewald says that "a vicarious liability theory cannot deprive Campbell-Ewald of derivative sovereign immunity." Pet. Br. 46. That begs the question by assuming that Campbell-Ewald is entitled to immunity to begin with. The illegal action for which Campbell-Ewald has been sued—sending a text message to a nonconsenting recipient—was not authorized by the Navy and indeed was specifically forbidden by the Navy. *No* entity can claim "derivative sovereign immunity" for this alleged violation of the TCPA. The TCPA's vicarious-liability regime does not override Campbell-Ewald's claim to immunity; there simply is no immunity to override.

Finally, Campbell-Ewald makes the astounding claim that contractors can assert immunity for acts that *violate* their contract with the government—so long as the contractor is acting within the "general scope" of its contract. Pet. Br. 47. On this view, a military contractor retained to interrogate wartime enemy combatants would enjoy "derivative sovereign immunity" for acts of torture committed during those interrogations—even if its contract with the government *specifically prohibited* tor-

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[17] In all events, Campbell-Ewald's brief never denies that the TCPA incorporates vicarious liability or that MindMatics was acting as its agent. And even if it did those issues would fall outside the questions presented. The court of appeals held that the TCPA incorporates vicarious liability and Campbell-Ewald did not seek certiorari on that question. Pet. App. 10a–14a.

ture. Campbell-Ewald makes no effort to explain how acts that violate the government's instructions can be "actions taken on the government's behalf." Pet. Br. 37. Nor does it explain how a contractor that breaches its contractual obligations to the government can be "executing [Congress's] will." *Yearsley*, 309 U.S. at 21. And at what point does a breach of contract become sufficiently grave as to take the contractor outside the "general scope" of the contractual relationship? Campbell-Ewald offers no guidance on that question, only a conclusory assertion that it acted within the "general scope" of its contract (whatever that means).[18]

C. Campbell-Ewald's Policy Arguments Are Without Merit

As with mootness, Campbell-Ewald tries to buttress its claim for immunity with policy considerations. Pet. Br. 48–50. None of this compensates for the absence of legal

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[18] Campbell-Ewald mischaracterizes the Solicitor General's position in *KBR, Inc., v. Metzgar*, 135 S. Ct. 1153 (2015) (denial of petition for writ of certiorari). The Solicitor General did not say that contractors "generally" should enjoy immunity when acting "within the general scope of the contractual relationship." Pet. Br. 47. The Solicitor General was making a *preemption* argument based on federal common law, limited to cases that "arise[] out of the combatant activities of the military." Brief for the United States as Amicus Curiae at 15, *KBR*, 133 S. Ct. 1523 (2013) (No. 13-1241) (emphasis omitted) (quoting 28 U.S.C. § 2680(j)). The Solicitor General did not endorse immunity for violations of federal law. Nor did he suggest that his preemption argument would apply to any contractor outside the military-combatant setting.

authority, but even if it could the arguments are unconvincing.

First, Campbell-Ewald never explains why qualified immunity is insufficient to induce contractors to take on projects for the government. Qualified immunity is enough to recruit federal employees. And although the government may agree to indemnify its employees for liabilities they incur, a contractor has the same ability to insist on an indemnification clause in its contract. No one thinks that the government's need to indemnify its employees defeats the doctrine of sovereign immunity or hinders the government's ability to hire competent people. So it is not apparent why government contractors should be subject to a different regime.

Second, Campbell-Ewald's theory of immunity would remove the competitive advantage for firms that can ensure compliance with the law and their contractual promises. Law-abiding firms, and firms that have installed precautions to prevent legal violations, have less reason to fear liability and can offer more attractive bids than firms that are prone to blundering. It is hard to see why this Court should adopt an immunity doctrine that puts negligent and law-abiding firms on an even playing field.

IV. CAMPBELL-EWALD'S ATTACKS ON CLASS-ACTION LAWYERS AND THE TCPA HAVE NO BEARING ON THE ISSUES BEFORE THIS COURT

Campbell-Ewald's brief is permeated with ad hominem attacks on Mr. Gomez and the class-action bar. *See* Pet. Br. 2 (suggesting that Mr. Gomez should have "brush[ed] off" the illegal text message rather than seek

recovery); *id.* at 4 ("[M]ore often than not the winners are the class action lawyers instead of the recipients of unwanted messages."); *id.* at 34–35 & n.8. Campbell-Ewald also complains loudly about the "mushroom[ing]" scope of liability under the TCPA. *Id.* at 3–4.

There are only two issues before this Court: mootness and immunity. Neither has anything to do with the merits of Mr. Gomez's claims or the scope of liability under the TCPA. And neither has anything to do with the different (and important) issue of whether class-action settlements too often benefit attorneys at the expense of absent class members. *That* is a subject for courts to address by applying the standards for class certification or scrutinizing class-action settlements under Rule 23—not by inventing new mootness or immunity doctrines that will extend far beyond class actions brought under the TCPA. *See* Brief of Amicus Nat'l Right to Work Legal Def. Found., Inc. Campbell-Ewald's efforts to sway this Court by attacking class-action lawyers and the TCPA are sophistry, and they do nothing to conceal the demonstrable shortcomings of its mootness and immunity arguments.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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